In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. . 78-233

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,
v.
HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Jurisdictional Statement.

FRANCIS X. BELLOTTI,
Attorney General,
THOMAS R. KILEY,
EDWARD F. VENA,
ALEXANDER G. GRAY, JR.,
Assistant Attorneys General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1224
Attorneys for Appellants.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Jurisdictional Statement.

The Attorney General of the Commonwealth of Massachusetts, as attorney for the Personnel Administrator and the Massachusetts Civil Service Commission,[1] submits this state-

[1] Appellants have retained the original caption of the case below for ease of identification even though the parties and their designations have changed. See Statement of the Case, *infra*, pp. 5-10 (Commonwealth of Massachusetts and Division of Civil Service dismissed as parties), and n. 4, *infra* (designation of Director of Civil Service changed).

ment in support of the contention that a final order and decision of the United States District Court for the District of Massachusetts should be reversed. That decision once again[2] invalidated Mass. Gen. Laws c. 31, § 23, the so-called Massachusetts veterans' preference statute.

The appellants contend that the latest decision of the district court in this case is inconsistent with prior opinions of this Court, including the opinion in *Washington* v. *Davis*, 426 U.S. 229 (1976), which triggered this Court's previous order of remand for reconsideration, and that it should therefore be summarily reversed. In the alternative, the appellants submit that the decision was based on the application of incorrect standards of law and that it raises substantial questions requiring plenary consideration by this Court.

Opinions Below.

This case is before this Court for the third time. Appellants originally sought review of the opinion of the district court dated March 29, 1976, and reported at 415 F. Supp. 485 (D. Mass. 1976). Upon review of appellants' Jurisdictional Statement, this court certified a single question to the Supreme Judicial Court of Massachusetts. The question concerned the authority of the Attorney General to proceed with the appeal over the express objections of the nominal defendants. The

[2] As indicated in other portions of this statement, this cause has been before this Court for consideration on two other occasions. *See* pp. 8-9, *infra*. A previous jurisdictional statement was docketed on August 26, 1976. The matter was assigned number 76-265. Although the papers filed in that matter are presumably available to the Court, this Jurisdictional Statement is intended to be a self-contained document and reference to those papers should be unnecessary.

certified question is reported at 429 U.S. 66 (1976). The opinion of the state court in response to the certified question is dated September 16, 1977, and is not yet reported in the official Massachusetts Reports. It appears, however, at 366 N.E. 2d 1262.

This Court then remanded the cause to the district court for reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976). The order of remand is reported at 434 U.S. 884 (1977). The opinion issued by the district court on remand is dated May 3, 1978, and is unreported. The opinions, judgment and order of the district court on remand are reproduced as an appendix to this statement (App. A).

Jurisdiction.

The present appeal is from a final order of a three-judge court of the United States District Court for the District of Massachusetts. That tribunal was convened pursuant to 28 U.S.C. §§ 2281 and 2284 upon the application of Helen B. Feeney, plaintiff-appellee, for a permanent injunction to restrain the enforcement, operation and execution of the Massachusetts veterans' preference statute. In the court below, Ms. Feeney sought an injunction and a declaratory judgment pursuant to 28 U.S.C. §§ 1331, 1343(3), 42 U.S.C. § 1983 and 28 U.S.C. § 2201, claiming that the statute extending preference to veterans in civil service employment in the Commonwealth, Mass. Gen. Laws c. 31, § 23, deprives women of equal consideration for public employment in violation of the Fourteenth Amendment.

The original opinion of the three-judge court was appealed to this Court, which in turn remanded the case with instructions to reconsider in light of *Washington* v. *Davis*, 426 U.S.

229 (1976). On May 3, 1978, the district court entered its judgment and order together with its opinion. The opinion reiterates the previous conclusion of the court that application of the veterans' preference statute had the predictable effect of excluding female applicants from the civil service system. The divided district court again declared the statute unconstitutional and again permanently enjoined the defendants from enforcing its provisions. A notice of appeal was filed with the district court on June 13, 1978. A copy of that notice is reproduced as an appendix to this statement (App. B).

Jurisdiction of this Court is conferred by 28 U.S.C. § 1253. Cases believed to sustain jurisdiction are: *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963); *Paul* v. *United States*, 371 U.S. 245 (1963); *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73 (1960).

Statute Involved.

Although the suits filed in district court challenged Mass. Gen. Laws c. 31, §§ 21-25, only § 23 was found to be unconstitutional and it is the sole Massachusetts statute directly before this Court on appeal. At the time of the district court opinion[3] Mass. Gen. Laws c. 31, § 23, provided:

> The names of persons who pass examinations for appointment to any position classified under the civil service

[3]On June 24, 1976, the Governor of the Commonwealth signed into effect Mass. St. 1976, c. 200, a statute establishing an interim veterans' preference statute which would operate only during the pendency of this case. Mass. Gen. Laws c. 31, § 23 (Supp. 1978-1979). The new statute is set out as an appendix to this statement (App. C).

> shall be placed upon the eligible lists in the following order: —
>
> (1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Question Presented.

Does the preference afforded veterans by Mass. Gen. Laws c. 31, § 23, violate the Equal Protection Clause of the Fourteenth Amendment?

Statement of the Case.

On November 4, 1974, Carol A. Anthony filed a civil complaint in the United States District Court for the District of Massachusetts, seeking to enjoin the enforcement of Mass. Gen. Laws c. 31, §§ 21-25.[4] The complaint was accompanied

[4]Named as party defendants were the Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission and the Director of Civil Service. After commencement of the action but prior to decision, the

by an application for a temporary restraining order and an application to convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284. A temporary restraining order was granted on November 4, 1974, and the application for a three-judge court was granted four days later.

The gravamen of the complaint was that the veterans' preference statute deprived the plaintiff of equal protection of the laws because it operated to exclude women from public employment and perpetuated the effect of sex discrimination established by federal regulation concerning military service. On May 19, 1975, the complaint was amended to include as additional plaintiffs Betty A. Gittes and Kathryn Noonan, who, like Ms. Anthony, were female non-veterans seeking employment as attorneys under the job description "Counsel I."

On May 20, 1975, Helen B. Feeney filed a complaint against the same defendants raising the same issues and alleging the same claims as plaintiff in the *Anthony* case. Ms. Feeney was employed by the Civil Defense Agency of the Commonwealth of Massachusetts from 1963 until March 28, 1975, first as a Senior Clerk Stenographer and then as Federal Funds and Personnel Coordinator. She was laid off on March 28, 1975. On May 22, 1975, Ms. Feeney, a non-veteran, sought a temporary order restraining the defendants from making or approving any appointment to any permanent position from the eligible list for positions classified as Administrative Assistant or Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth. The requested order further sought extension of the expiration date of the eligible list for the latter position. The order was assented to and duly entered, and on May 23, 1975, the court consolidated the two actions.

position of the Director of Civil Service was eliminated and its functions transferred to the Personnel Administrator of the Commonwealth, Mass. St. 1974, c. 835.

The defendants moved to dismiss the *Anthony* case as moot due to the passage of an act exempting all attorney positions, including those classified as Counsel I, from the provisions of civil service law, Mass. St. 1975, c. 134. They also moved to dismiss the *Feeney* case for want of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Counsel executed lengthy statements of agreed facts, submitted simultaneous briefs on all issues, and presented oral argument to the three-judge panel on the merits.

On March 29, 1976, the three-judge district court issued the final order and opinions reproduced at 415 F. Supp. 485 (D. Mass. 1976). The court found that the claims brought by the plaintiffs in the *Anthony* case were mooted by the passage of the state statute exempting attorney positions from the operation of the civil service law and accordingly entered judgment for the defendants in that case. The court further found that neither the Commonwealth of Massachusetts nor the Division of Civil Service were "persons" within the meaning of 42 U.S.C. § 1983 and therefore dismissed the complaints against them. No notice of appeal was filed as to these aspects of the final judgment and order.

The Court permanently enjoined the remaining defendants[5] from utilizing the veterans' preference statute in filling civil service positions within the Commonwealth. The sharply-divided court held that Mass. Gen. Laws c. 31, § 23, had the effect of depriving female civil service applicants of equal protection of the laws and was unconstitutional. The majority opinion clearly based this holding of an analysis of the impact rather than the purpose of the statute vis-a-vis female applicants. The dissent of Murray, D.J., strongly suggested that

[5]The remaining defendants are the Civil Service Commission and the Personnel Administrator, who supplanted the Director of Civil Service, n. 4, *supra*.

the impact analysis employed by the majority was not the proper means to assess the constitutionality of a state statute allegedly violating the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis test to the challenged statute, Judge Murray concluded that the veterans' preference law passed constitutional muster.

On May 25, 1976, the Attorney General of the Commonwealth filed a notice of appeal from the partial final judgment invalidating Mass. Gen. Laws c. 31, § 23. An application for a stay and a motion for relief from judgment pursuant to Rule 60(b)(6), Fed. R. Civ. P., accompanied the notice. Before a hearing was held on these motions, this Court rendered its decision in *Washington* v. *Davis*, 426 U.S. 229 (1976). On June 15, 1976, appellants filed a supplemental motion for relief from judgment, urging reconsideration in light of the intervening decision of this Court. A hearing was held on the motions and application for a stay on June 23, 1976. The motions for relief from judgment were denied from the bench, but the application for a stay pending appeal to this Court was orally allowed. At the request of plaintiff-appellee's counsel, formal action on the stay was delayed one day to permit the drafting of an order effectively reinstating the earlier temporary restraining order. The formal entry of the stay was rendered moot by the passage of an interim statute. *See* n. 3, *supra*. On June 28, 1976, the court entered an order denying the motions for relief from judgment but taking no action on the application for a stay.

An application for an extension of time to docket the appeal was filed with this Court on July 17, 1976, and allowed by order of Brennan, J., on July 20, 1976. The appellants docketed their appeal on August 23, 1976. Subsequently, the nominal defendants advised the Clerk of this Court by letter that the appeal was not authorized by them and that it was taken over their objection. Their request that the Court

dismiss the appeal was echoed in a motion to dismiss or affirm filed by the appellee and an *amicus curiae* brief in opposition to jurisdiction filed by the Commonwealth's Secretary of Administration and Finance "with the knowledge and approval of the Governor."

On November 8, 1976, this Court certified a single question to the highest court of the Commonwealth. In essence the question posed was whether the Attorney General had the authority to prosecute an appeal to this Court over the expressed objection of the named state defendants against whom judgment was entered. On September 16, 1977, the Supreme Judicial Court answered the question in the affirmative, confirming the authority of the Attorney General to appeal this particular case.

Upon receipt of this answer, this Court summarily disposed of the appeal. In a *per curiam* order dated October 11, 1977, the Court vacated the judgment below and remanded the case for further consideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976).[6]

Eight days after the remand, the District Court ordered the parties to submit briefs addressing the issues raised by the order of this Court. The Agreed Statement executed in 1975 was not updated and no further evidence was submitted, but the court did receive briefs and hear oral argument. On June 13, 1978, the district court, divided as it had been in its earlier opinion, found Mass. Gen. Laws c. 31, § 23, to be violative of the Equal Protection Clause of the Fourteenth Amendment.

The opinions and order appended to this statement do not differ markedly from those entered in 1976. The Court has again enjoined the individual defendants from utilizing the veterans' preference statute in filling civil service positions.

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[6]Three justices would have noted probable jurisdiction and set the case for oral argument.

The majority opinion still is premised on an analysis of the impact of Mass. Gen. Laws c. 31, § 23, on distaff applicants. The brief concurrence distinguishes *Davis* and still adheres to the former opinion of the district court. The dissent of Murray, D.J., again states that the veterans' preference statute is facially neutral, is not motivated by discriminatory intent, and therefore must be judged according to the rational basis test. The posture of the case, therefore, is essentially the same as when it was last before this Court, except that each of the judges below has ostensibly reevaluated the case in accordance with the order of remand.

The Questions Presented are Substantial.

I. Introduction.

In seeking to demonstrate that substantial questions are presented by this statement, the appellants have broken their argument into two parts. First, the appellants show that the district court improperly treated the case on remand. Rather than undertake a searching inquiry into the intent behind the veterans' preference statute, as the holding of this Court requires, the lower court unconvincingly attempted to distinguish away the *Davis* decision, stating that this case does not involve facially neutral state action. This statement misconstrues the meaning of facial neutrality and is clearly erroneous.

Then the court, applying what it termed a "totality of the circumstances" test, isolated three factors which it thought justified a finding of discriminatory intent. Two of the three factors are based on the statute's impact, and the third is of marginal relevance on the issue of intent. The court then concluded that although Mass. Gen. Laws c. 31, § 23, was not

designed or motivated by a desire to harm women, the requirement of intent is met by the fact that the Massachusetts legislature was willing to accept a disproportionate impact on female civil service applicants as a cost of benefitting veterans. The decision of the district court is inconsistent with *Davis* both because it is based almost entirely on an impact analysis and because it misconceives the meaning of intent. Accordingly, summary reversal is appropriate.

In the second section, appellants demonstrate that even if the veterans' preference statute were an example of intentional gender-based discrimination, it would still meet constitutional standards. Application of the statute does not implicate a fundamental right or a suspect classification, and the law therefore should not have been subjected to a strict scrutiny analysis. The Massachusetts veterans' preference law rationally furthers legitimate state interests, and any questions as to the wisdom of the particular legislative policy are to be resolved in other forums. The district court's treatment of this case conflicts with traditional equal protection analysis and requires plenary consideration by this Court.

II. The District Court Decision on Remand Conflicts with Washington v. Davis and Requires Summary Reversal.

A. *The Lower Court Erred in Determining that the Statute is Not Facially Neutral.*

In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court articulated the constitutional principle that a law or other state action which is neutral on its face does not violate the Equal Protection Clause solely because it has a disproportionate im-

pact on a discrete and insular minority. In reconsidering its prior decision after the order of remand, the lower court determined that this principle was inapplicable to the instant case because the Massachusetts veterans' preference law "is not facially neutral." App. A, p. 11a n. 7. This distinction is totally without merit. The conclusion that the statute is not facially neutral in terms of gender is inconsistent with the previous conclusions of the lower court, and also flies in the face of previous opinions of this and other tribunals.

Even a cursory reading of the challenged statute makes it clear, as the lower court has previously acknowledged,[7] that the law is facially neutral in terms of gender. Although it distinguishes between veterans and non-veterans, the statute draws no line based on the sex of civil service applicants.[8] All similarly situated males and females are treated equally under its terms, and under the standards previously enunciated by this Court, the statute is neutral on its face. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *City of Los Angeles* v. *Manhart*, ___ U.S. ___, 98 S. Ct. 1370 (1978).

Concededly, the benefits extended by Mass. Gen. Laws c. 31, § 23, are bestowed on a class composed largely of males. However, the fact that the application of the statute benefits

[7]In his original opinion, the judge writing for the majority stated, "[f]acially the Veterans' Preference is open to both men and women." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 498 (D. Mass. 1976) (Tauro, D.J.). The concurring opinion in the latest decision also appears to consider the law to be facially although not actually neutral: "The statute can be called facially neutral in that it does not make a division based strictly on sex." App. A, p. 17a n.*. (Campbell, C.J.).

[8]There has been no showing that the preference involved was enacted as a mere pretext to accomplish the goal of invidious discrimination against distaff civil service applicants. In fact, it appears to be beyond dispute that the law was not enacted for the purpose or with a motive to disqualify women from receiving civil service appointments. *Anthony* v. *Massachusetts*, *supra*, at 495; App. A, p. 6a.

more persons of one sex than the other does not obviate the statute's facial neutrality; analysis of a statute on its face and analysis of the statute as applied are two different things. It is pure sophistry to distinguish away this Court's holding in *Davis*, premised as it is on the inadequacy of impact alone to render facially neutral acts unconstitutional, by stating that an act is not facially neutral if it has a disproportionate impact. It would be inconsistent with the mandate of this Court to allow such circular reasoning to avoid the holding in *Davis*.

The significance of the statute's "facial neutrality" cannot be overstated. The district court indicated that the standards to be used in assessing neutral and non-neutral statutes differ markedly. Specifically, the court conceded that "foreseeability of impact" would not be an adequate standard in cases involving facially neutral statutes. App. A, p. 11a n. 7. Since foreseeability was the key to the lower court ruling in this case, see Part II, B, *infra*, the question of the facial neutrality of the statute may well be outcome-determinative. By way of illustration, each court which has recently assessed the constitutionality of veterans' preference legislation has recognized those laws to be gender-neutral. *See, e.g., Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou* v. *State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977). Each of them has also upheld the challenged statutes on constitutional grounds. At the very least, then, the lower court's treatment of the facial neutrality of Mass. Gen. Laws c. 31, § 23, presents a substantial question requiring plenary consideration.

B. *The District Court Improperly Concluded that the Veterans' Preference Statute is an Instance of Intentional Gender-Based Discrimination.*

In reconsidering their prior opinion in this case, the lower court majority only paid lip service to the central tenet of *Washington* v. *Davis*, *supra*. By stating that only intentional discrimination against minority groups violates the Equal Protection Clause, this Court has shifted the focus in constitutional cases from an assessment of discriminatory effect to a probing inquiry into motives. Disproportionate impact is not irrelevant to that inquiry, "but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution." *Id.* at 242. The courts are now required to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Often the impact of the challenged action provides an important starting point in the inquiry, but it is only in the rarest of cases that impact alone will suffice as proof of purpose. *Id.*

Here the majority opinion purports to look to evidence other than impact and to apply a "totality of the circumstances"[9] test to determine the intent of the legislature in enacting the veterans' preference statute. Appellants submit, however, that on remand the court engaged once again in the now outmoded impact analysis which characterized its earlier opinion, and that if there was any reconsideration, it was in name only.

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[9]App. A, pp. 8a, 10a. The "totality of the circumstances" test appears to be derived from the "non-exhaustive" series of six standards enumerated in *Village of Arlington Heights*, *supra*, at 266-277. Significantly, only one of those six standards was mentioned by the district court, *i.e.*, the impact of the official action.

The court premised its finding of intent on only three factors; two of these factors are a function of the statute's effect and the third is of marginal significance on the issue of intent. In the order cited by the majority opinion and considered herein, those factors are (1) the foreseeability of the statute's impact, (2) the lack of a demonstrable relationship between one's status as a veteran and one's job performance and (3) the actual impact of the statute. These factors, whether considered separately or in combination, are insufficient to establish discriminatory intent or motive.

1. Foreseeability of Impact.

At the heart of the lower court's analysis is the premise that the foreseeable impact of veterans' preference is the reduction of job opportunities for women, and that intent to discriminate against females can be inferred from that fact. The argument is that the number of female veterans is small, that the Massachusetts legislature was presumptively aware of that fact when it enacted the statute, and that the legislature intended the natural and foreseeable adverse effect on non-veteran females worked by veterans' preference. Apparently the lower court was applying a modified tort concept of foreseeability. But, the "principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation." App. A, p. 26a. The lower court's duty to look to other evidence under these circumstances is not satisfied by the mere application of "foreseeability of impact" test. Indeed, such a test was rejected by this Court in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976), and has been convincingly repudiated by other federal courts. *See, e.g., United States* v. *Texas Education Agency*, 564 F. 2d 162, 168

(5th Cir. 1977); *United States* v. *City of Chicago*, 549 F. 2d 415 (7th Cir. 1977); *Guardians Assoc. of New York City Police Dept.* v. *Civil Service Commission*, 431 F. Supp. 526 (S.D. N.Y. 1977). It is conceded that veterans' preference will necessarily benefit more men than women, and it is presumed that the legislature was willing to accept this adverse effect as a consequence, however unfortunate, of a salutary program to benefit veterans. However, that is quite different from asserting that the statute was motivated by an anti-female animus.

2. Job-Relatedness.

The probative value of the second factor isolated by the court, the job-relatedness of statutes as a veteran,[10] is grossly overstated in the majority opinion. If the only purpose served by Mass. Gen. Laws c. 31, § 23, were the promotion of an effective civil service system, then extension of a preference would be a departure from the norm which might be indicative of discriminatory motive. This is manifestly not the case with the veterans' preference statute, which was primarily intended to benefit qualified individuals for their prior service to the nation. By isolating this factor the court added little or nothing to the search for invidious discrimination based on gender and suggested that it failed to comprehend the difference between cases raising Title VII claims and those based on the Equal Protection Clause.

[10]Neither the dissenting justice nor the appellants concede that having served in the military is irrelevant to job performance. App. A, p. 25a (Murray, D.J., dissenting); *Feinerman* v. *Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973).

3. Impact.

Like foreseeability and job-relatedness, a statistical analysis of the impact of Mass. Gen. Laws c. 31, § 23, provides no support for an inference of intent. This case presents facts which are a far cry from the stark pattern of discrimination which in and of itself requires a finding of purposeful deprivation of constitutional rights. The Massachusetts veterans' preference law is not now and never has been an insurmountable barrier to women seeking employment with the Commonwealth, and the evidence before the lower court did not even indicate a "gross statistical disparity" between the number of male veterans and females hired by Massachusetts. *See, Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). While one can hardly argue that the preference extended to veterans is insignificant, the record below shows that more non-veterans were hired in the Commonwealth's official service[11] during the relevant period than veterans, and that non-veteran females hired actually outnumbered male veterans. Furthermore, until the influx of veterans into the job market in the post-Viet Nam era, the statute did not prevent the plaintiff herself from obtaining meaningful civil service employment. In light of these facts, it is clear that application of the veterans' preference statute does not produce results so

[11]The statistics which were included in the record before the court below relate primarily to the "official service" of the Commonwealth. The official service is but one of two components of the state's civil service system, which itself does not include all positions in state service. At the time the Agreed Statement of Facts was executed below, fully 40 per cent of all state jobs were not civil service positions and were not subject to Mass. Gen. Laws c. 31, § 23. Thus, other than facts pertaining to the plaintiff's particular application history, some unquantified general statements and an analysis of selected lists, the basis for the decision below was a statistical analysis of one minor portion of state service in which 43 per cent of those appointed during the sample period were females.

grossly disproportionate that intentional discrimination was proved. *Compare*, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

The inadequacy of these three factors to support a finding of purposeful or intentional discrimination is reflected in the actual language of the district court opinion. The lower court has not found that the veterans' preference law was motivated by a desire to discriminate against females. Indeed, the district court has repeatedly acknowledged the lack of such intent. In its earlier opinion, the court stated that "[t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony* v. *Massachusetts*, 415 F. Supp. at 495. That thought is echoed in the court's latest opinion, where the concurring judge wrote, "To be sure, the legislature did not wish to harm women." App. A, p. 19a.

On the contrary, the essence of the decision is that the legislature's "clear intent" in passage of the veterans' preference "was to benefit veterans even [if the benefits came] at the expense of [female job applicants]." App. A, p. 6a. The legislature's apparent willingness to accept an adverse impact on women as a corollary of extending benefits to veterans has thus been equated with intent or motive in the eyes of the court. As the dissenting judge notes, such a conclusion "says nothing about motive and is entirely consistent with a finding that the legislature saw the impact on women as extremely regrettable but unavoidable." App. A, p. 29a n. 9.

Here both the standards utilized by the district court and its ultimate finding of intent are inconsistent with the holdings in *Davis* and *Arlington Heights*. The Massachusetts veterans' preference law is a neutral statute which has natural but

unintentional adverse side effects on women.[12] Given the standards previously articulated by this Court for such cases and the holding of the court below, summary reversal is warranted.

III. The Massachusetts Veterans' Preference Statute Rationally Promotes Legitimate State Interests and is, Therefore, Constitutional.

Having determined that *Washington* v. *Davis*, *supra*, is distinguishable from this case and, in the alternative, that the veterans' preference statute intentionally discriminates against women, the lower court found it unnecessary to reconsider and revise its earlier opinion. A finding of intent, however necessary it may be to a determination of a violation of the Fourteenth Amendment, should not terminate a court's equal protection analysis. On the contrary, a finding of intent is merely a condition precedent to the commencement of that analysis. In the instant case the district court undertook no new analysis, and the arguments presented herein are addressed primarily to the prior opinion appearing at 415 F. Supp. 485 (D. Mass. 1976).

Traditional equal protection analysis requires strict scrutiny of a legislative classification only if it impermissibly interferes

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[12] See dissenting opinion of Murray, D.J., at App. A, pp. 22a-23a:

> The attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral, and in operation the effects are uneven; the only difference is that the statute here has a weightier impact on the relevant group, and impact alone is not determinative, *Washington* v. *Davis*, *supra*, at 239. [Footnote omitted.]

with a fundamental right[13] or impinges on the rights of a suspect class.[14] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Other state classifications are examined under the rational basis standard, "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Id.* at 314.

The opinion of the district court proceeded from a recognition of the fact that there is no fundamental right to public employment. 415 F. Supp. at 499. Furthermore, the lower court found it unnecessary to determine whether classifications based upon sex are suspect, 415 F. Supp. at 495,[15] choosing instead to base its opinion on the impact of the statute on women. Because neither a fundamental right nor a suspect classification was involved, a rational basis test rather than a strict scrutiny test should have been applied. However, the court did not apply a rational basis test. While it is unclear what test was applied, the majority opinion discloses that the court engaged in a "least restrictive alternative" inquiry.[16]

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[13] Among the fundamental rights requiring application of a strict scrutiny standard are the right to equal access to the vote, *Bullock* v. *Carter*, 405 U.S. 134 (1972); freedom of speech and association, *Williams* v. *Rhodes*, 393 U.S. 23 (1968); and the right of interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[14] Only three classifications have been found suspect by the Supreme Court. They are race, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); ancestry or national origin, *Oyama* v. *California*, 332 U.S. 633 (1948); and alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971).

[15] This Court "has never viewed [sex] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." *Regents of University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4905 (June 27, 1978). Accordingly, sex classifications are not judged by the compelling state interest test. *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

[16] "[T]he fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women. . . . Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976).

On remand the majority again stated: "The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans, underscores our conclusion that the absolute and permanent preferences adopted by the Commonwealth resulted from improper evaluation of competing considerations." App. A, p. 16a.

That test is a corollary of strict scrutiny and is only appropriate where fundamental constitutional rights or liberties are at stake. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51 (1973).

Had the three-judge district court applied a rational basis test, the statute clearly would have withstood judicial scrutiny. With the exception of the decision of the court below, veterans' preference statutes have been uniformly upheld by the federal courts whenever challenged as a violation of the Equal Protection Clause. *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972). *See, also, Ballou* v. *State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977). The courts have reached such decisions on the basis of traditional equal protection analysis "which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

It is beyond dispute that the Commonwealth has legitimate state interests which are served by veterans' preference. The original majority opinion of the district court states:

Massachusetts, like other states, and like the federal government, has consistently provided preferential treatment in public employment to those who have served in the nation's armed forces. . . . The modern Veterans' Preference Statute has its roots in legislation enacted in the seventeenth century and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans. The program is designed to encourage service in the armed forces, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life.

Nothing in the Fourteenth Amendment prohibits Massachusetts from providing special treatment to veterans in considering candidates for public employment. . . . Such a policy responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare. 415 F. Supp. at 496-497. (Footnotes and citations omitted.)

The legitimate state interests furthered by the veterans' preference statute are to reward veterans who have served their country in time of war, to rehabilitate and relocate veterans whose lives have been disrupted by military service, and to recognize that valuable work qualities gained in the military are conducive to public service. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 496 (D. Mass. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252, 259 (M.D. Pa. 1973). In theory Mass. Gen. Laws c. 31, § 23, is remedial legislation, intended to benefit a class of individuals, most of whom are males, who have borne the brunt of the nation's defense. In *Regents of University of California* v. *Bakke*, 46 U.S.L.W. 4896 (June 27, 1978), this Court recognized the constitutional validity of

facially non-discriminatory remedial preferences when applied without invidious intent.[17]

By its operation, the Massachusetts veterans' preference statute seeks to accommodate the provision of benefits to those who have served in the military with the need of the Commonwealth for an effective work force. It may be argued that Mass. Gen. Laws c. 31, § 23, only roughly accommodates these sometimes conflicting interests and that it could have been more wisely drawn. Indeed, although most states and the federal government have enacted statutes designed to afford veterans an employment preference, none of those other statutes is drafted in precisely the same fashion as the Massachusetts law. Nevertheless, judgments as to the wisdom of a state statute and determinations related to the accommodation of competing interests are uniquely amenable to legislative rather than judicial resolution. *Kahn* v. *Shevin*, 416 U.S. 351, 356 n. 10 (1974). *Accord*, *Massachusetts Board of Retirement* v. *Murgia*, *supra*; *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

Because the Massachusetts law rationally promotes legitimate state interests without infringing on fundamental rights or the rights of a suspect class, the lower court should not have substituted its judgment for that of the General Court by engaging in a search for a less restrictive alternative. Even

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[17] In *Bakke*, the fatal defect of the medical school admissions policy was that it acted to foreclose non-minorities totally from consideration solely because of race. Significantly, the Court acknowledged that race or ethnic background was a factor which could be deemed a plus in a remedial entrance program. The Massachusetts veterans' preference scheme is a remedial program that does not totally foreclose civil service employment opportunities for women. The preference is merely one factor to be considered in an elaborate civil service program, but in no way requires ultimate appointment. *Compare*, *Morton* v. *Mancari*, 417 U.S. 535 (1974), where an Indian qualifying for a preference must be hired over a non-Indian.

if it had properly found the provisions of Mass. Gen. Laws c. 31, § 23, to intentionally discriminate against females, the district court still should have applied a rational basis test to the challenged statute and upheld it on constitutional grounds.

Conclusion.

The questions presented by this statement are substantial. Appellants respectfully urge this Court to reverse summarily the decision of the district court or to note probable jurisdiction and set the case down for argument.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
THOMAS R. KILEY,
EDWARD F. VENA,
ALEXANDER G. GRAY, JR.,
Assistant Attorneys General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1224
Attorneys for Appellants.

Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

CIVIL ACTION
No. 75-1991-T

Judgment and Order.

May 3, 1978.

TAURO, D.J.

1. Judgment is entered in favor of the Commonwealth of Massachusetts and the Division of Civil Service in *Feeney v. Commonwealth*, CA 75-1991-T, because these defendants are not "persons" within the meaning of 42 U.S.C. § 1983. *Anthony v. Commonwealth*, 415 F. Supp. 485, 487, n. 2 (D. Mass. 1976).

2. Judgment is entered in favor of the plaintiff Feeney in No. 75-1991-T, against the Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission on the ground that Mass. Gen. Laws ch. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) is unconstitutional in that it operates to deny female civil service applicants equal protection of the laws.

It is ORDERED that:

(a) The Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission are

hereby permanently enjoined from utilizing Mass. Gen. Laws ch. 31, § 23 (1971) in any future selection of persons to fill civil service positions with the Commonwealth.

(b) This injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction.

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,
PLAINTIFF,

v. CA 75-1991-T

COMMONWEALTH OF MASSACHUSETTS, ET AL.
DEFENDANTS

Opinion.

May 3, 1978.

TAURO, D.J.

By order of remand from the Supreme Court, we have been instructed to reconsider our decision in *Anthony v. Common-*

wealth,[1] 415 F. Supp. 485 (D. Mass. 1976), in light of the Court's subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976).[2] After further briefing and oral argument, we conclude that *Davis* does not require us to alter our original holding. To the contrary, we have determined that both *Davis* and the Court's later opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), support our conclusion that the challenged Massachusetts Veterans' Preference statute[3] deprives women

[1] This case, originally entitled Anthony v. Commonwealth, was brought as two separate actions under 42 U.S.C. § 1983 by four Massachusetts women challenging the Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23. The plaintiffs in *Anthony* were three non-veteran women, admitted to the Massachusetts bar, who had applied for positions as counsel to state agencies. Plaintiff Feeney, in a separate suit, sought an administrative post in the civil service. The two suits were consolidated. We determined that the claims brought by the plaintiffs in *Anthony* were rendered moot by passage in April, 1975 of Mass. Gen. Laws ch. 31, § 5, which removed all appointments for state and municipal legal positions from the provisions of the state civil service law. We considered plaintiff Feeney's claim on the merits. Our decision in the *Feeney* case is the subject of the court's remand order presently before us.

[2] Also before the court is plaintiff's motion to amend the complaint to add a cause of action challenging the Veterans' Preference Act as violative of the Equal Rights Amendment to the state constitution, ratified in November, 1976, several months after our original opinion had issued. Plaintiff's motion raises several important issues, namely whether an amendment to the complaint would be within the scope of the Court's order of remand, whether the doctrine of abstention would require us to certify plaintiff's claim to the Massachusetts Supreme Judicial Court, and whether we would be obliged to consider the state claim prior to reaching the federal constitutional issue in this case.

Plaintiff asserts as a basis for the motion that, in the event her federal claims are rejected, she may be estopped from bringing a separate suit based on the state claim. At oral argument, however, the Commonwealth stipulated that it would not seek to raise the defense of estoppel with respect to plaintiff's state claim should there be a subsequent proceeding in the state court. Having in mind the Commonwealth's stipulation, we deny plaintiff's motion to amend. Fed. R. Civ. P. 15(a).

[3] Mass. Gen. Laws ch. 31, § 23.

of equal protection of the laws and, therefore, is unconstitutional.[4]

I

The Anthony Decision.

The broad issues in this case are treated extensively in our prior opinion. 415 F. Supp. 485. In order to put in context our reconsideration of *Anthony*, however, it is useful to outline briefly some of its major points.

The statutory scheme challenged in *Anthony* established a formula that permanently prevents a non-veteran from achieving a place on the civil service appointment list ahead of a veteran, regardless of comparative test scores.[5] We pointed

[4] In *Anthony*, we enjoined enforcement of Massachusetts Veterans' preference statute, Mass. Gen. Laws ch. 31, § 23, because it deprived women of equal protection under the law. The state subsequently filed a motion for relief from judgment, urging reconsideration in light of *Davis*. That motion, along with a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6), was denied, although a stay pending appeal was granted. The stay was rendered moot by the passage of an interim statute, Stat. 1976, c. 200, which suspends operation of the challenged statute pending the outcome of this case on appeal. The interim statute is presently in effect and provides a modified point preference for veterans.

[5] An applicant who passes the civil service written examination becomes an eligible and is placed on an "eligible list" under the following ranking formula:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

Mass. Gen. Laws ch. 31, § 23; Anthony v. Commonwealth, 415 F. Supp. 485, 488 (D. Mass. 1976).

The full statutory procedure by which eligible applicants are certified and selected is set forth in our original opinion. 415 F. Supp. at 488-490.

out that "(a)s a practical matter . . . the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list." 415 F. Supp. at 489.

The selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility of women for participation in the military. Long-standing federal policy limited to 2% the number of women who could participate in the armed forces. *Anthony v. Commonwealth*, *supra*, at 489. Traditionally, enlistment and appointment criteria have been more restrictive for women than for men.[6] An inevitable consequence of this federal policy limiting women's participation in the military is that only 2% of Massachusetts veterans are women. *Id.*

> (T)he practical consequence of the operation of these federal military proscriptions, in combination with the Veterans' Preference formula is inescapable. Few women will ever become veterans so as to qualify for the preference; and so, few, if any, women will ever achieve a top position on a civil service eligiblity list, for other than positions traditionally held by women.

Id. at 490.

We recognized that the prime legislative motive of the challenged statute, that of rewarding public service in the military was worthy. *Id.* at 496. But we also observed that,

[6] A complete summary of the limitations placed on women seeking entry into the armed forces is set forth in our earlier opinion. 415 F. Supp. at 489-90.

> (i)t is not enough that the prime objective of the Veterans' Preference statute . . . is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational.

Id. at 497.

We determined that the means chosen by the Massachusetts Legislature to reward veterans were not grounded "on a convincing factual rationale." *Id.* at 495. We pointed out that the challenged statutory formula was not an effort by the state to set priorities for finite resources; that there were less drastic alternatives available to the state, such as a point system; and that any argument attempting to relate the challenged formula to job performance or qualification was "specious." *Id.* at 495-499. We concluded that the formula relegated job-related criteria and professional qualifications to a secondary position. *Id.* at 497.

Moreover, we emphasized that the challenged preference was absolute and permanent. No time limit was imposed or attempt made "to tailor its use to those who have shortly returned to civilian life." *Id.* at 499. Such a broad-brush approach may be administratively convenient, but mere administrative convenience is not a legitimate basis for benefiting one identifiable class at the expense of another. *Reed v. Reed*, 404 U.S. 71 (1971).

Although the Veterans' Preference statute was not designed for the sole purpose of subordinating women, *Anthony v. Commonwealth*, *supra*, at 495, its clear intent was to benefit veterans even at the expense of women. As we stated,

> (T)he formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but

> an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women.

Id. at 495. Rather, we found the preference formula to be

> a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts women.

Id. at 496.

The consequences of adopting a permanent absolute preference formula tied to federal enlistment restrictions were more than predictable, they were inevitable.

II

The Impact of Davis on Anthony.

At issue in *Davis* was a pre-employment literacy test used by the District of Columbia police department. The district court rejected plaintiffs' allegation that the test was "culturally slanted" to favor whites. It determined further that the test was "reasonably and directly" related to the requirements of the police recruit training program, although unrelated to actual job performance. 426 U.S. at 235. The D.C. Circuit reversed, holding irrelevant the failure of plaintiffs to allege and prove discriminatory intent in the exam's design and administration. It determined that the disproportionate percentage of blacks who had failed the exam sufficed to establish a constitutional violation. *Id.* at 236-37.

In reversing the court of appeals, the Supreme Court stated that claims of invidious discrimination under the fifth or fourteenth amendments require proof of a discriminatory purpose. A facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact. That Court emphasized that discriminatory intent need not be "express or appear on the face of the statute." 426 U.S. at 241, but that consideration must be given to the totality of the circumstances. Disproportionate impact is one such highly relevant circumstance we must consider.

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

426 U.S. at 242. *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). This point was amplified by Justice Stevens in his concurring opinion.

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

Id. at 252 (Stevens, J., concurring). *See also Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977) (Stevens, J., concurring).

A major factor distinguishing *Davis* from the case at hand is the nature of the selection procedure challenged in each case. Although the plaintiffs in *Davis* originally challenged the entire District of Columbia police recruitment scheme, the sole issue before the Supreme Court was the validity of the written civil service test. *Washington v. Davis, supra*, at 233-35.

The district court in *Davis* determined that the challenged test was neutral on its face. *Id.* at 235. This determination apparently provided a basis for the Court's statement that,

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248. (Footnoes omitted.)

The factual underpinning in this case is entirely different. As we have already emphasized, the Veterans' Preference statute is "anything but an impartial, neutral policy of selection with merely an incidental effect on the opportunities for women." 415 F. Supp. at 495. Here, plaintiff does not challenge the civil service written examination but, rather, the overriding ranking formula that mandates an absolute job preference to veterans over non-veterans, regardless of comparative test scores. This preference formula effectively "replaces testing as the criterion for determining which eligibles will be placed at the top of the list." *Id.* at 489.

In analyzing the "totality of the relevant facts" so as to determine the legislative intent underlying the challenged statute, we must of necessity examine official acts or policies to determine whether they had the natural, foreseeable and inevitable effect of producing a discriminatory impact.[7] *See*

[7] Defendants assert that a "foreseeability test" violates the mandate in *Davis*. Specifically, defendants rely on the Court's remand in Austin Independent School District v. United States, 429 U.S. 990 (1977), for the proposition that "inferences about intent flowing from arguably foreseeable consequences is not a substitute" for inquiry into specific intent. Defendants' Reply Brief at 7.

An order of remand is ambiguous in import. Justice Powell's concurrence suggests the remand in *Austin* may have been prompted by the breadth of the remedial relief ordered. 429 U.S. at 991, 992. *See also* School District of Omaha v. United States, 97 S. Ct. 2905 (1977); Dayton Board of Education v. Brinkman, 97 S. Ct. 2766 (1977). We will not presume that the Court utilized a remand order in *Austin* to abrogate the basic precept that a person is deemed to intend the natural, probable and foreseeable consequences of his actions. Nothing in *Davis* would indicate rejection in equal protection cases of this long-standing principle. *See* Arthur v. Nyquist, 429 F. Supp. 206, 210 (W.D. N.Y. 1977). Indeed, the Court recognized the difficulty of direct proof of intent, stating that the discriminatory purpose need not be express or appear on the face of the statute. 426 U.S. at 241. Moreover, Justice Stevens' concurrence suggests that this precept has continued vitality. *Id.* at 253 (Stevens, J., concurring).

Washington v. Davis, supra, at 253 (Stevens, J., concurring); *N.A.A.C.P. v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977).

The legislature was, at the least, chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military,[8] and the inevitable discriminatory consequences produced by their application to the challenged formula.[9]

Defendants cite two cases where the "foreseeability test" was considered and rejected. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n, 431 F. Supp. 526 (S.D. N.Y. 1977). These cases are clearly distinguishable. In both, the challenged procedures were found to be neutral. Here, we have determined the challenged statutory scheme to be "anything but an impartial, neutral policy of selection." 415 F. Supp. at 495.

We do not hold that in all cases a plaintiff may attempt to circumvent the intent requirement of *Davis* solely by presenting proof of foreseeability of impact. We are dealing here with a statute that is not facially neutral. Moreover, it has an inevitable discriminatory impact on a clearly identifiable class. These are relevant facts to consider in determining underlying legislative intent.

[8] *See* Anthony v. Commonwealth, 415 F. Supp. 485, 489-90 (D. Mass. 1976).

[9] The legislative history does suggest an awareness on the part of the lawmakers of the predictable discriminatory impact the preference formula would have on women. Until 1971, most of the veterans' preference statutes and civil service regulations included provisions approving the practice of requisitioning only female applicants for certain positions. Jobs for which women were requisitioned were exempted from operation of the statute. *See* Mass. Gen. Laws ch. 31, § 23 (1966); Acts 1922, ch. 463; Acts. 1919, ch. 150, § 2; Acts 1895, ch. 501, § 2. Although the 1895 statute on its face appears to exempt women from the operation of the veterans' preference with respect to all available jobs, the prior and subsequent legislative history suggest that the statutory language was merely consistent with the preexisting rule permitting single sex lists. See Civil Service Rule XIX(3) promulgated pursuant to Stat. 1884, Ch. 320. If a request were made for a female applicant, the Commissioner had no authority to certify a male for the position, regardless of his veteran status. Op. Att'y Gen. 68 (1941). In 1971, the legislature repealed this statutory exemption. Acts 1971, ch. 219.

> In practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98% of this state's women from obtaining significant civil service appointments.

Anthony v. Commonwealth, *supra*, at 498.

We must also assume that the legislature was cognizant of the fact that the stringent entry criteria embodied in the federal military regulations bore "no demonstrable relation to an individual's fitness for civilian public service." *Id.* at 498-99. We realize that a due process or equal protection claim is not to be judged by the standards applicable under Title VII. *Washington v. Davis*, *supra*, at 239. Our holding that the Massachusetts civil service selection process is unconstitutional is not based solely on the fact that it bears no relationship to job performance. But the fact that the criteria set forth in the challenged statutory formula fail to measure job performance is one additional circumstance bearing on the question of discriminatory intent.[10]

Statistics show that the exemption operated only to preserve sterotypically "female" clerical jobs for women. *See* 415 F. Supp. at 488. Contrary to defendants' assertion, elimination of this exception did not remove the last vestiges of sex discrimination from the statutory scheme; it only served to make all positions in the civil service subject to the overriding preference formula. *See* Comment *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv. L. Rev. 805, 812 (1977); Fleming and Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L.J. 13, 53 (1977).

[10] It is significant to note that the Court in *Davis* adopted the finding of the district court that the challenged test "directly related to the requirements of the police training program." 426 U.S. at 235.

Finally, the statistical evidence presented by plaintiff demonstrates a pattern of exclusion of women from the civil service.[11] At the time the suit was filed, only 2% of Massachusetts veterans were women.[12] Although 43% of the civil service appointees were women, a large percentage of them served in lower grade positions for which men traditionally did not apply. Of the women appointed over a ten year period, from July 1, 1963 through June 30, 1973, only 1.8% were veterans, while 54% of the men had veteran status. 415 F. Supp. at 488.

The facts demonstrate that this absolute job preference formula had a devastating impact on the plaintiff's attempts to advance her position in the civil service. In 1971, she received the second highest test score for the position of Assistant Secretary to the Board of Dental Examiners, but was ranked sixth on the list of eligibles, behind five male veterans, four of whom had received lower scores. She was not certified and a male veteran with a lower examination score was appointed.

Two years later when she applied for another administrative post, plaintiff received the third highest mark on the exam, but only ranked fourteenth on the list, behind twelve

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[11] Plaintiff argues that this statistical presentation of itself creates a presumption of purposeful discrimination, thereby shifting the burden of proof to defendants. *See* Castaneda v. Partida, 430 U.S. 482 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976). In view of our subsidiary and ultimate findings and conclusions, based on an uncontradicted record, concerning the existence of discriminatory intent, we conclude that plaintiff has met her burden of proof without the benefit of a presumption and, therefore, find it unnecessary to address this procedural issue.

[12] At oral argument the parties stated that there is no reason to revise the agreed statement of facts submitted in *Anthony*. Moreover, there is no reason to assume that the facts have changed measurably, inasmuch as the challenged statute has not been in effect due to passage of the interim point preference statute. *See* n. 2, *supra*.

male veterans, eleven of whom had lower test scores. Again, plaintiff was not certified for appointment. The third time she applied for an administrative position, plaintiff received a score that would have placed her within the top twenty places on the eligibles list. By operation of the formula, however, she was ranked 70th on the list, behind 50 male veterans with lower test scores. *Id.* at 497-498.

These figures, and others cited in our earlier opinion,[13] show a clear pattern of exclusion of women from competitive civil service positions. Unlike the defendnats in *Davis*, the Commonwealth has not made any showing of affirmative efforts to recruit women, or of a recent rise in the percentage of women appointed to competitive civil service positions. In *Davis* the district court found that 44% of the new police recruits over the preceding three years had been black, a figure roughly approximating the proportion of blacks in the area. That court also found that the Department had "systematically and affirmatively sought to enroll black officers, many of whom passed the test but failed to report for duty." 426 U.S. at 236.

The situation here is in marked contrast. The Commonwealth's proffered 57-43 ratio of men to women is misleading. A large percentage of female positions for which males traditionally have not applied. Some women received their appointments through a now defunct practice by which the appointing authorities would requisition only women applicants for certain jobs. 415 F. Supp. at 488.[14] While the officials in *Davis* sought "systematically" to recruit minorities who had passed the preemployment test, the defendants here have demonstrated no attempt to mitigate the permanent and absolute impact on women of a formula that systematically excludes them from desirable public service positions even

[13] *See* 415 F. Supp. at 488, 491-92, 497-98.

[14] *See* n. 10, *supra*.

though they have demonstrated their qualifications by passing a written exam.[15]

The Commonwealth argues that,

> historical analysis makes it clear that the enactment of this legislation by the General Court was in no way motivated by a desire to discriminate against women. Rather, the legislative motivations for Massachusetts Veterans' Preference statutes were: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service.

Brief for Defendants at 24, 25.

We disagree. It is clear that the Commonwealth's motive was to benefit its veterans. Equally clear, however, is that its intent was to achieve that purpose by subordinating employment opportunities of its women. The course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state. *See Anthony v. Commonwealth*, *supra*, at 496. The fact that the Commonwealth had a salutary motive does not justify its intention to realize that end by disadvantaging its women.

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory

[15] We recognize that "(m)ere absence of recruitment efforts, by itself is not equivalent to an intent to discriminate," Guardians Assoc. of the New York City Police Dept. v. Civil Service Comm'n, 431 F. Supp. 526, 535 (S.D. N.Y. 1977). We emphasize that our finding of discriminatory intent is not based soley on the Commonwealth's failure to show affirmative efforts to recuit women. This is merely one of the factors we rely on in considering the totality of the circumstances.

purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Development Housing Corp., supra, at 265. (Footnotes omitted.)

The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans,[16] underscores our conclusion that the absolute and permanent preference adopted by the Commonwealth resulted from improper evaluation of competing considerations. By intentionally sacrificing the career opportunities of its women in order to benefit veterans, the Commonwealth made a constitutionally impermissible value judgment.

We reaffirm our holding that the Massachusetts Veterans' Preference Act denies equal protection under the law and, therefore, is unconstitutional.

JOSEPH L. TAURO,
District Judge.

CAMPBELL, *Circuit Judge* (concurring). This is not an easy case to deal with under *Washington v. Davis*, 426 U.S. 229 (1977). On the other hand, there can be no question about the unequal impact of this law: practically speaking, it permanently shuts off whole areas of state employment to women. On the other hand, as Judge Murray points out in his dissent,

[16] Anthony v. Commonwealth, 415 F. Supp. 485, 499 (D. Mass. 1976).

a strong initial case can be made for the proposition that it is "neutral on its face," and not motivated in any ordinary sense by a discriminatory intent.* Arguably, therefore, the challenged statute is the kind of law which, notwithstanding its widespread impact on women's employment opportunities, should be upheld as constitutional. The thrust of *Washington v. Davis* and related decisions such as *Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), is that we must accept that well-intentioned programs may have uneven side effects: society is too complicated for every discriminatory consequence to disqualify legitimate policies. Welfare programs, for example, foreseeably benefit minority groups disproportionately, just as tax deductions do whites. Examinations (as in *Washington v. Davis*) designed reasonably to weed out those unqualified for police work, may eliminate minority applicants more than others. Town and city planning laws, designed to improve community life, may because of separate economic factors, create barriers to minorities. Society would soon be in a state of paralysis if it could adopt only laws having strictly equal impact upon all groups and classes within it.

But while I fully recognize not only that *Washington v. Davis* is the law of the land but also that its principle reflects an essential limitation upon the sweep of the equal protection clause, I do not believe that the Massachusetts veterans prefer-

* The statute can be called facially neutral in that it does not make a division based strictly on sex. The law provides employment preference for veterans, not males. While veterans are 98% male, a few veterans are female, and there are many males who are not veterans.

The statute can likewise be said not to be based on a discriminatory intent, in the sense that no one thinks that it was enacted as a pretext to harm women. While the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law, but rather the entirely justifiable desire to aid individuals who had served their country, often at great sacrifice.

ence law actually falls within its ambit. This, as Judge Tauro convincingly demonstrates, is no ordinary statute having merely an incidental unequal impact. It is a statute which goes a long way towards making upper level state employment a male preserve. Upon close inspection, the seeming "neutrality" of the veterans preference law, and even its seeming absence of intentional discrimination, are both open to serious question.

I turn first to the matter of its neutrality. While the dividing line between veterans and non-veterans is not the same as the dividing line between men and women, the ineluctable effect of this law is to confer an absolute priority upon a class that is 98% male in a sphere of employment where women, generally, should have the same access as men. What the law does, is to take a group which has, for unique reasons, been selected almost exclusively from the male population (military service being what it was and is), and grant it an absolute preference in an entirely different sphere of public employment where male preference is not only not the rule but is constitutionally impermissible. The law may be "facially neutral" in the limited sense that it is not based overtly on selection by sex, but since the preferred class is 98% male the effect is virtually the same as if it were.

The discriminatory impact in *Washington v. Davis* was far less inevitable: the selection device at issue, a police examination, did not mandate the recruitment of a class made up, overwhelmingly, of whites. While past experience might have indicated that proportionately fewer blacks than whites would pass the neutral examination, this was not an inevitable outcome: a black who was determined to succeed might by dint of extra effort make up for past disadvantages; coaching and recruiting measures, as well as educational and economic improvements, might, over the years, increase the number of successful blacks. No such opportunity exists here for women.

The veterans preference law prefers an already established class which, as a matter of historical fact, is 98% male. Because only persons who have served during wartime are eligible for the preference, the class cannot be expanded in the near future to include more women. Thus its "neutrality" is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and "built-in".

This same inevitability of exclusionary impact upon women also undermines the argument of no discriminatory intent. There is a difference between goals and intent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goaal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended? Doubtless the impact on women, if considered at all, was regarded as an acceptable "cost" of aiding veterans. But may society properly elect to aid veterans or any other group at the cost of abolishing equal employment opportunities in a major segment of public employment? In my view, the answer is "no".

This is not to say that society may not bestow benefits upon veterans. But I think it may not construct a system of absolute preference which makes it virtually impossible for a women, no matter how talented, to obtain a state job that is also of interest to males. Such a system is fundamentally different from the conferring upon veterans of financial benefits to which all taxpayers contribute, or from the giving to them of some degree of preference in government employment, as

under a point system, as a *quid pro quo* for time lost in military service. The latter measures do not impose unfairly upon one segment of our society; the instant law, in contrast, forces women to pay a disproportionate share of the cost of benefiting veterans by sacrificing their own chance to be selected for state employment.

Thus while it is concededly a close question whether the Massachusetts veterans preference is to be regarded as the sort of neutral classification with unintended effects absolved by *Washington v. Davis*, I feel on balance that it is not. Rather the law is more realistically viewed as substantively non-neutral. The destruction of normal female opportunities in the state employment system is too evident a consequence of the super-imposition of veterans as an absolutely preferred class upon that system. If this can be done constitutionally, the equal protection clause of the Constitution is, in this area of employment, little more than a hollow pretense, whatever it may remain in theory. As I think the unique problem posed in this case is distinguishable from any contemplated in *Washington v. Davis*, I adhere to our former judgment.

LEVIN H. CAMPBELL,
U.S. Circuit Judge.

MURRARY, Senior District Judge (Dissenting). *Washington v. Davis*, 426 U.S. 229, 239, 242 (1977) holds:

> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Emphasis in original.]
>
> * * * * * * *

> . . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

The majority today determines that *Washington v. Davis*, *supra*, supports their previous holding that the Massachusetts Veterans' Preference statute, Mass. Gen. Laws ch. 31, § 23, deprives women of equal protection of the laws in violation of the Fourteenth Amendment in all areas of civil service employment in the Commonwealth. Although recognizing that "[a] facially neutral statute may not be deemed vulnerable to equal protection challenge solely because it has a disproportionate impact", *ante* at 8, Judge Tauro reaches this determination by finding that "[w]e are dealing here with a statute that is not facially neutral", *ante* at 13, fn. 7, and that it is the Commonwealth's intent to achieve the purpose of benefiting its veterans "by subordinating employment opportunities of its women". *Ante* at 20. Judge Campbell concurs in the judgment of unconstitutionality, finding that the inevitability and degree of disproportionate effect make the statute non-neutral and that the inevitability of effect suggests discriminatory intent. With respect, I disagree that these findings and the result reached are demonstrably tenable.

I

The Veterans' Preference statute is not on its face gender-based. *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485, 501 (1976) (Campbell, C.J., concurring). Clearly the statutory "division between veterans and non-veterans is not drawn along sex lines and does not provide for dissimilar

treatment for similarly situated men and women. On its face the statute is neutral . . .". *Id.* at 503 (Murrary, J., dissenting). Most persons favored by the statutory preference are males, although a substantial number of those not so favored are also males. Non-veteran women in larger numbers share with non-veteran men the disfavor of the statute, but a number of those aided by the statue indeed are women. The statute explicitly includes women in its requirement for service during time of war, but not combat duty. Mass. Gen. Laws ch. 4, § 7, cl. 43; ch. 31, § 21; 1958 Op. Atty. Gen., 25-26. Although in operation it favors males in greater proportion than females for the higher civil service positions,[1] the statutory classification has not been shown to be a mere pretext to accomplish the purpose of invidiously discriminating against women. *See Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Moreover, it is not disputed that the statutory preference was not enacted for the purpose of disqualifying women from receiving civil service appointments. *Anthony v. Commonwealth of Massachusetts*, *supra* at 495.

The attempted distinction between the test in *Davis* and the statute here is totally unconvincing: one is no more neutral than the other. In each case the classification is facially neutral, and in operation the effects are uneven; the only difference is that the statute here has a weightier impact on the

[1] Unequal treatment of plaintiff's interest in the opportunity for public employment under a statute serving ends otherwise within the power of the state to pursue, violates no fundamental interest guaranteed to plaintiff by the federal constitution. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Since the statute here is neutral on its face, and since it is undisputed that the statute was not enacted to harm women, the statutory scheme to benefit veteran men and women in the area of public employment to the disadvantage of non-veteran men and non-veteran women does not offend the equal protection clause of the Fourteenth Amendment.

relevant group, and impact alone is not determinative, *Washington v. Davis*, *supra*, at 239.[2]

II

In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-266 (1977), the Court said:

> Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. *Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause* . . . [Emphasis supplied.]
>
> . . . [I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a *proof that a discriminatory purpose has been a motivating factor in the decision*, this judicial deference is no longer justified. [Emphasis supplied.]

The record before the court, to the extent that it provides direct and circumstantial evidence of intent, does not show,

[2] Judge Campbell states this result is an "unescapable and 'built-in'" feature of the law, *ante* at ____. But in weighing his argument that the statute is for that reason, *inter alia*, impermissibly discriminatory against women, it cannot be overlooked that the unfavorable impact of the statute is shared alike by non-veteran women and a large number of non-veteran men.

the operation of the statute and its effect to be a clear pattern, unexplainable on grounds other than an intent to limit the employment opportunities of women. This is so, whether the relevant facts are viewed totally or separately. Conceding the factor of unequal impact and that it was foreseeable, a showing of unconstitutional action has not been made. Even in *Davis* the government officials there might well have foreseen that blacks would not do so well on the test as whites. *See Boston Chapter, N.A.A.C.P. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974). Awareness on the part of the legislature that disproportionate impact is not enough.[3] Awareness, like foreseeability, is not proof of discriminatory intent, and other evidence is required. The legislative history of the statute with its unequal impact on women is clearly explainable as having the purpose of preferring qualified veterans for consideration for civil service jobs.[4]

[3] *See* the concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Powell, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 180 (1977):

> That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent.

[4] The effect of certain statutory enactments would appear to be protective of women. *See* St. 1895, c. 501, § 1 and St. 1896, c. 517, § 2. Each sets out details of the preference and concludes: "But nothing herein contained shall be construed to prevent the certification and employment of women." *See* Opinion of the Justices, 166 Mass. 589, 592-593 (1896). The legislature in 1971 revised the provision allowing single sex requisitions, with the result that the number of "women's" jobs protected from the preference was severely limited, but the purpose of the revision would appear to be the prevention of occupational sex discrimination: the statute allows single sex requisitions only after approval has been obtained from the Massachusetts Commission Against Discrimination. Mass. Gen. Laws ch. 31 § 2A(e). *See also* G. Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buff. L. Rev. 3, 38 (1976-77).

The preference statute is not vulnerable to the claim that discriminatory intent may be inferred because there is no relationship between the preference and job performance. In the first place, the contention of no such relationship is open to dispute, *see Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973), but even if that contention were to prevail, it would bear on intent only if job performance were the *only* goal the legislature could serve by means of the preference. That is obviously not the case here, for it is in the national interest that enlistment in the armed service be encouraged, *see e.g.*, H. Rpt. No. 93-857, 93rd Cong., 2d Sess. (1974) (Armed Forces Enlisted Personnel-Bonus Revision Act of 1974), and hiring preferences are well-established means for furthering that purpose. *See, e.g., Anthony v. Commonwealth, supra* at 496, 497; 42 U.S.C. § 2000e-11.

The statistical evidence presented by plaintiff provides no support for an inference of a discriminatory purpose. This is an impact argument, and *Arlington Heights* (and *Davis*) requires proof of intent as "a motivating factor". Plaintiff's systematic exclusion argument analogizes the jury-selection cases, but those cases do not apply in the context of this case. *Arlington Heights* pointed out that "[b]ecause of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* [v. Hopkins, 118 U.S. 356 (1886)] or *Gomillion* [v. Lightfoot, 364 U.S. 339 (1960)] . . .". 429 U.S. at 266, n.13.[5] Whatever the exact

[5] The Court may be referring to the difference between an inference of intent from the cumulative impact of a series of administrative determinations and an inference from the impact of a rule promulgated by prior legislative or administrative action, *see Shield Club v. City of Cleveland*, 14 E.P.D. ¶ 7763 (N.D. Oh. 1976); it may be referring to the presumption, more likely in jury cases than in other cases, that the result of selection will be random, *see J. Ely, Legislative and Administrative Motivation in Constitution Law*, 79 Yale L.J. 1205, 1263-66.

focus of the Court in jury-selection cases, the Court makes it clear that even in those cases impact alone is determinative only when it emerges as "a clear pattern, unexplainable on grounds other than race", *Arlington Heights*, *supra* at 266. The facts here do not fit into that mold: it is undisputed that the preference here is based on a determination to help veteran men and women and not non-veterans.

Plaintiff's reliance on *Castaneda v. Partida*, 430 U.S. 482 (1977), which Judge Tauro finds no need to address, *ante* at 16, n.11, is distinguishable from the case before us. In that case statistics were used to show that the number of Mexican-Americans on certain grand juries normally to be expected, had the jurors been chosen randomly, was so much higher than the actual number of Mexican-Americans called that plaintiff had made out a prima facie case of equal protection violation. The statistics were presented in the context of the operation of the "key man" system of jury selection which allows jury commissioners to select jurors from a list on which Spanish surnames are easily identifiable, and the system is thus "susceptible of abuse". 430 U.S. at 497, 484-85, 495. No evidence was presented by the State, and the Court recognized that there would be no constitutional violation were the State to explain the numerical discrepancy on neutral grounds. As pointed out above, the preference statute is clearly explainable as having the purpose of preferring veteran men and women at the expense of non-veteran men and women.

III

The principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation. Principles of

federalism involve a "recognition of the value of state experimentation with a variety of means for solving social and economic problems", *Anthony*, *supra* at 502 (Murrary, J., dissenting), and considerations of federalism require that an impermissible motive in enacting state legislation be not lightly inferred. *See* Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1093-94, n.101; A. Bickel, *The Least Dangerous Branch*, 214; P. Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation, 1971 Sup. Ct. Rev. 95, 129-30. Inevitability of effect, even coupled with disproportionate impact, "absent a pattern as stark as that in *Gomillion* or *Yick Wo*" is not evidence of discriminatory purpose or intent.[6] *See Davis*, *supra* at 242; *Arlington Heights*, *supra* at 266. A legislature's choice of preferring veterans implies invidious intent only if it appears inconsistent with expected and valid considerations.[7]

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[6] The heart of Judge Campbell's argument is the following:

> To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme — as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?

Ante at ____. The answer to his question must be that inevitability of effect is relevant only where it bears on intent, and to find intent as that word is used in *Washington v. Davis* one must find motive. Judge Campbell concedes that "[w]hile the harm to female employment opportunities is extensive and, given the statutory scheme, inevitable, it was not this harm which prompted passage of the law . . .". *Ante* at ____, n.*. Where, as here, a law's consequences were inevitable, but there is no evidence at all that those particular consequences motivated the legislature, they can indeed be described as unintended.

[7] *See* P. Brest, *supra*, 1971 *Sup. Ct. Rev.* at 121-122; Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 332-43 (1976).

In most hiring situations the difference in the scores of those certified would likely be very little different were the veterans' preference not in effect.[8] There is here no indication that the legislature departed from usual considerations in enacting the preference. To the extent, however, that the legislature wishes to use civil service hiring practices to favor veterans, any effort to diminish the impact on women by diluting the preference necessarily results in a diminution of the benefit to veterans. Because of this nature of the hiring benefit, use of the "absolute" preference instead of a point preference, like the use of any perference at all, provides no ground for indictment of the legislature's motive.

IV

Since *Washington v. Davis*, three veterans' preference provisions have been subjected to equal protection challenge; all

[8] For one of the positions applied for by plaintiff, that of Solomon Head Administrative Assistant, the three applicants certified, of whom one would be chosen, had scores of 77.40, 93.28, and 90.20. Without the veterans' preference, the top three scores would have been 94.88, 93,28, and 92.32 (plaintiff). Agreed Statement of Facts (hereinafter "Statement") ¶¶ 12, 13, Exhibits, 2, 4. For another position, that of Administrative Assistant, there were seven positions available. Eleven persons would be certified, Statement ¶ 9, and were the top eleven all to indicate interest, the positions would be filled from a group with scores of 88, 86, 86, 84, 94, 92, 92, 92, 90, 90, and 90. Without the preference, the selections would be from a group with scores of 94, 92, 92, 92, 91, 90, 90, 90, 90, 89, and 89. Statement ¶¶ 16, 17, Exhibit 7. For a third position, Assistant Secretary, Board of Dental Examiners, the top three scores were 89.72, 78.08, and 83.64; without the preference, the top three scores would have been 89.72, 86.68 (plaintiff), and 83.98. Statement ¶ 27, Exhibit 61. That the appointee for this position had a score of 78.08, the lowest of the three certified, indicates that there are other important qualifications besides test scores and thus that there is little reason to believe that the quality of the employee pool is significantly lowered by its containing persons with slightly lower test scores than would be present absent the veterans' preference statute.

three have been upheld. *Bannerman v. Dept. of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou v. State, Dept. of Civil Service*, 372 A.2d 333 (N.J. App. Div. 1977), *aff'd*, 46 U.S.L.W. 2454 (N.J. 1978). Three of the decisions distinguish *Anthony v. Commonwealth*, *supra*, as having been based on a stronger negative effect on women than those courts faced. The California court, however, states that the approach used in *Anthony* was "rejected in *Washington v. Davis*", *Bannerman*, 436 F. Supp. at 1280. Each court had little trouble in concluding that no intent to harm women was present, even in the "absolute" preference at issue in New Jersey. The Illinois court's language is representative.

> While those who never served in the armed forces, those who served at times not within the statutory periods and women who are not veterans suffer a disadvantage in hiring and promotion, this is an incidental result of a statute intended to reward veterans and not one intended to discriminate against men and women who are not veterans or those whose service was in times of limited military action.

Branch v. DuBois, 418 F. Supp. at 1133.[9]

[9] This court would seem to have agreed in its earlier opinion, where the majority stated that

> [t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments.

Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 495 (1976). Nowhere in his opinion has Judge Tauro said that the Massachusetts legislature intended to harm job opportunities for women or that limiting

The impact of the statute at issue here does not approach the extremes described in *Arlington Heights, supra* at 266, and plaintiff must prove intent by other evidence. This she has not done. The question: Would the veterans' preference statute have been enacted if women were represented in the armed services in such numbers that the preference would have no discriminatory effect? has not been addressed by plaintiff, and she has given the court absolutely no reason to answer this question in the negative. She has failed to make out a prima facie case of discriminatory intent. *See Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). In light of *Washington v. Davis* I would not hold, as the majority does, that the Massachusetts Veterans' Preference statute violates the Equal Protection Clause of the Fourteenth Amendment. I dissent.

FRANK J. MURRAY,
Senior District Judge.

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such opportunities was a motive in enactment of the legislation, and that, of course, is precisely what must be shown. All Judge Tauro will say is that the legislature's "clear intent was to benefit veterans even at the expense of women", *ante* at 7. This says nothing about motive and is entirely consistent with a finding that the legislature saw the impact on women as extremely regrettable but unavoidable.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

HELEN B. FEENEY,
PLAINTIFF,

v.

CIVIL ACTION
No. 75-1991-T

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS,

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10(2), the Defendants specify:

1. The parties taking the appeal are the Personnel Administrator of the Commonwealth (referred to as the Massachusetts Director of Civil Service in the pleadings) and the members of the Massachusetts Civil Service Commission, who are collectively referred to herein as the Defendants;

2. Defendants appeal from paragraph 2 of the Judgment and Order of the Court entered on May 3, 1978, and from subparagraph (a) of the order enjoining Defendnats from utilizing Mass. Gen. Laws c. 31, § 23 (1971) (The Massachusetts Veterans' Preference Act) in any future selection of persons to fill civil service positions with the Commonwealth; and

3. Direct appeal to the Supreme Court of the United States is authorized by 28 U.S.C. 1253.

Respectfully submitted,
By Their Attorneys,
FRANCIS X. BELLOTTI,
Attorney General,
THOMAS R. KILEY,
First Assistant Attorney General
EDWARD F. VENA,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachustts 02108.
(617) 727-1224

DATED: June 13, 1978.

[Certificate of Service omitted in printing.]

Appendix C.

MASSACHUSETTS ACTS OF 1976.

Chap. 200. AN ACT SUSPENDING THE OPERATION OF THE VETERANS PREFERENCE LAW SO-CALLED, PENDING A DECISION OF THE UNITED STATES SUPREME COURT AND PROVIDING FOR THE ESTABLISHMENT OF A POINT SYSTEM OF PREFERENCE DURING SUCH SUSPENSION.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is, in part, to maintain the system of veterans preference and to facilitate the system of public service in the commonwealth, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted, etc., as follows:

SECTION 1. Section 23 of chapter 31 of the General Laws is hereby suspended until final judgment has been entered in the case of *Helen B. Feeney v. Commonwealth* which was brought in the United States District Court.

SECTION 2. Until the expiration of the period of suspension provided in section one, the grade received in a civil service examination by a disabled veteran or by the widow or widowed mother of a veteran who was killed in action or who died from service connected disability incurred in wartime service shall be increased by ten points and the grade of other veterans as defined in section twenty-one of said chapter thirty-one shall be increased by five points. In any such examination in which experience is a factor in determining an applicant's grade or eligibility a veteran shall be given credit for service in the armed forces when his employment in a similar vocation to

that for which he was examined was interrupted by service, and for all experience material to the position for which he was examined, including experience gained in religious, civic, welfare, service and organizational activities, regardless of whether he received pay therefor.

The names of applicants who have qualified in a competitive civil service examination shall be entered on their appropriate registers or list of eligibles in the following order:

For positions in job Group XVII or higher in the salary and classification plan of the commonwealth or positions in the service of a city or town for which an equivalent salary has been established, in order of their rating, including points added under this section, and

For all other positions:

(A) disabled veterans who have a compensable service-connected disability of ten per cent or more, in the order of their ratings, including points added under this section; and

(B) remaining applicants, in the order of their ratings, including points added under this section.

The names of persons entitled to additional credit under this section shall be entered ahead of others having the same rating. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

SECTION 3. The provisions of this act shall apply to all eligible lists established as a result of an examination held prior to or after its effective date. Persons appointed from lists established under the provisions of this act during the period of suspension of section twenty-three of chapter thirty-one, as provided in section one of this act, shall for all purposes be deemed to have been properly appointed under said chapter thirty-one, notwithstanding a decision in said case of *Helen B. Feeney v. Commonwealth* which may hold that the provisions of said section twenty-three are constitutional.

Approved June 24, 1976.